96-990

No. 96-9990

Supreme Court, U.S.
FILED
JAN 21 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

FELTON E. HUDSON; GEORGE DUNCAN, R. TEX RITTER, *et al.*,

Petitioners,

v.

DELTA AIR LINES, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM H. BOICE*
JEFFREY A. VAN DETTA
KILPATRICK & CODY
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
(404) 815-6500

D. MICHAEL KEEN
DEBORAH D. BROWN
MONROE T. HILL, JR.

Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta
International Airport
Atlanta, Georgia 30320
(404) 715-2386

Attorneys for Respondents
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30pp

QUESTIONS PRESENTED

The question presented for review by the Court is more appropriately stated as the following:

1. Should the Supreme Court grant certiorari to review the Court of Appeals' determination that the District Court correctly exercised its broad discretion in holding that the individualized nature of the reliance issues underlying Petitioners' ERISA claims precludes maintenance of a class action in this particular case?

LIST OF PARTIES

The list of parties provided in the Petition at pages ii-iv is substantially correct.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 2

STATEMENT OF THE CASE 2

1. The Clear Terms Of Delta's Medical Benefits Plan and Handbook 4

2. Prospective Changes To The Plan Announced By The Company 6

a. The Service-Related Premium 6

b. Prospective Changes Announced In 1992 8

3. The August 1993 Enhanced Retirement Program 11

REASONS FOR DENYING THE WRIT 12

I. The Routine Exercise Of Discretion In Applying Class Certification Standards To The Individualized Reliance Claims Of Petitioners In This Case Does Not Present An Issue For Review By This Court 12

II The Court Of Appeals' Decision Here Does Not Conflict With Decisions Of Any Other Circuit 16

CONCLUSION 23

TABLE OF AUTHORITIES

Page

U.S. Supreme Court Cases

Curtiss-Wright Corp. v. Schoonejongen, ___ U.S. ___, 115 S. Ct. 1223 (1995) 4

General Tel. Co. v. Falcon, 457 U.S. 147 (1982) 12

Varity Corp. v. Howe, ___ U.S. ___, 116 S. Ct. 1065 (1996) 19, 20, 21

U.S. Court of Appeals Cases

Abrams v. Interco, Inc., 719 F.2d 23 (2d Cir. 1983) 12

Adams v. LTV Steel Mining Corp., 936 F.2d 368 (8th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992) 15

Clark v. Coates & Clark, Inc., 990 F.2d 1217 (11th Cir. 1993) 14

Fischer v. Philadelphia Elec. Co., 96 F.3d 1533 (3d Cir. 1996) 14

Forbush v. J.C. Penney Co., 994 F.2d 1101 (5th Cir. 1993) 21

Hudson v. Delta Air Lines, Inc., 90 F.3d 451 (11th Cir. 1996) 2, 13, 18, 19, 20, 21

In re American Med. Sys. Inc., 75 F.3d 1069 (6th Cir. 1996) 20

In re Unisys Corp. Retiree Med. Ben. "ERISA" Litig., No. 94-1801, 1995 U.S. App. LEXIS 15020 (3d Cir. June 28, 1995) 18

In re Unisys Corp. Retiree Medical Benefits "ERISA" Litigation, 57 F.3d 1255 (3d Cir. 1995), *cert. denied*, 116 U.S. 1316 (1996) 18, 19, 20, 21

Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584 (7th Cir. 1993), *cert. denied*, 117 S. Ct. 305 (1996) 14

TABLE OF AUTHORITIES – Continued

Page

Sprague v. General Motors Corp., ___ F.3d ___, 1996 U.S. App. LEXIS 29367 (6th Cir. Nov. 7, 1996), *vacating* 92 F.3d 1425 (6th Cir. 1996) 1

Sprague v. General Motors Corp., 92 F.3d 1425 (6th Cir. 1996), *vacated*, ___ F.3d ___, 1996 U.S. App. LEXIS 29367 (6th Cir. Nov. 7, 1996) 17

Van Poyck v. Singletary, 11 F.3d 146 (11th Cir. 1994) 12

U.S. District Court Cases

Alday v. Container Corp. of Am., No. 87-488-CIV-J-16, 1988 U.S. Dist. LEXIS 18421 (M.D. Fla. Sept. 2, 1988) 14

Brooks v. Southern Bell Tel. & Tel. Co., 133 F.R.D. 54 (S.D. Fla. 1990) 14

Johnston v. Midland Career Inst., No. 93 C 1363, 1993 WESTLAW 420954 (N.D. Ill. Oct. 18, 1993) 14, 15

Polich v. Burlington Northern, Inc., 116 F.R.D. 258 (D. Mont. 1987) 14

Smith v. MCI Telecommunications Corp., No. Civ. A. 87-2110-0, 1990 WESTLAW 58708 (D. Kan. Apr. 9, 1990) 14

Spencer v. Central States, Southeast & Southwest Areas Pension Fund, 778 F. Supp. 985 (N.D. Ill. 1991) 14

Sprague v. General Motors Corp., 768 F. Supp. 605 (E.D. Mich. 1991), *aff'd in part and rev'd in part*, 92 F.3d 1425 (6th Cir. 1996), *vacated*, ___ F.3d ___, 1996 U.S. App. LEXIS 29367 (6th Cir. Nov. 7, 1996) 18

TABLE OF AUTHORITIES – Continued

Page

Sprague v. General Motors Corp., 843 F. Supp. 266 (E.D. Mich. 1994), *aff'd in part and rev'd in part*, 92 F.3d 1425 (6th Cir. 1996), *vacated*, ___ F.3d ___, 1996 U.S. App. LEXIS 29367 (6th Cir. Nov. 7, 1996) 18

Sprague v. General Motors Corp., 857 F. Supp. 1182 (E.D. Mich. 1994), *aff'd in part and rev'd in part*, 92 F.3d 1425 (6th Cir. 1996), *vacated*, ___ F.3d ___, 1996 U.S. App. LEXIS 29367 (6th Cir. Nov. 7, 1996) 18

STATUTES

29 U.S.C. § 1002(1) 4

29 U.S.C. § 1022 4

29 U.S.C. § 1051(1) 4

29 U.S.C. § 1081(a)(1) 4

29 U.S.C. § 1102(a)(1) 4

29 U.S.C. § 1104 14

29 U.S.C. § 1140 14

RULES

Sup. Ct. R. 14.1(g) 2

Sup. Ct. R. 14.4 3

Fed. R. Civ. P. 23 12

Fed. R. Civ. P. 23(a) 16

INTRODUCTION

Respondents Delta Air Lines, Inc., *et al.*, ("Respondents") respectfully request this Court to deny the Petition for Writ of Certiorari seeking review of an order of the United States Court of Appeals for the Eleventh Circuit, which affirmed the Order of the United States District Court for the Northern District of Georgia in favor of Respondents and against Petitioners on a discretionary ruling with respect to class certification. This case is inappropriate for review by the Court because it involves nothing more than the District Court's exercise of discretion in applying well-established standards under Fed. R. Civ. P. 23 to the set of facts presented by Petitioners' claims. Petitioners do not contend that the wrong standards were employed; instead, they argue that the District Court's ruling was wrong because they disagree with it – which presents no issue for review by this Court. Furthermore, Petitioners' attempt to create the illusion of a "conflict" with other cases fails precisely because this is a case in which the Court of Appeals simply affirmed the District Court's exercise of discretion on the facts before it, and those facts do not fit the legal theories that Petitioners would like to use. Indeed, the case principally relied upon by Petitioners – *Sprague v. General Motors Corp.* – was vacated well before the Petition was filed. ___ F.3d ___, 1996 U.S. App. LEXIS 29367 (6th Cir. Nov. 7, 1996), *vacating* 92 F.3d 1425 (6th Cir. 1996).[1]

---

[1] Significantly, the Petition here was filed six weeks after the panel decision in *Sprague* was vacated, yet Petitioners fail to acknowledge that fact, and cite the vacated opinion extensively throughout the Petition.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is published at 90 F.3d 451 and is reprinted in the Appendix accompanying the Petition at pages App. 18a-34a. The decision of the United States District Court for the Northern District of Georgia (Tidwell, J.) is reprinted in the Appendix to the Petition at pages App. 42a-50a.

STATEMENT OF THE CASE

Petitioners have provided the Court with an argumentative statement of facts that is inappropriate and not supported by the discovery that has taken place in the case or by the appellate record.[2] The facts, carefully

[2] Petitioners' factual statement does not comport with Sup. Ct. R. 14.1(g), which provides that it must "se[t] the facts out material to consideration of the questions presented," which should in candor also state both those favorable and unfavorable with inferences drawn from facts clearly identified as such. Petitioners ignore the extensive evidence revealed in discovery to date that establishes the divergent and varied nature and bases of Petitioners' claims, presumably because these facts do not support Petitioners' arguments. In addition, the Petition contains a number of purportedly factual assertions that, characterized generously, are inferences lacking in any factual basis. For example, Petitioners make a vague allegation, bereft of any support, that Delta is planning "further" changes in retiree medical benefits if Delta "is permitted to get away with its current alteration of medical benefits." (Petition, p. 5 n.1). Regardless of whether Delta plans to exercise its right (expressly reserved in the Delta Family-Care Medical Plan and the Summary Plan Description) to modify or amend any given

considered by the District Court and Court of Appeals, show that the case is inappropriate for class treatment because:

1. Petitioners are seeking to manufacture exceptions to the clear terms of an ERISA benefits plan;

2. No "uniform" statements were made to Petitioners about post-retirement benefits other than to inform employees as to what those benefits were at the time, how they would be changed prospectively, effective January 1, 1993, and that they might change further in the future; and

3. No "uniform" assurances were made to Petitioners that there would not be an enhanced retirement program available in the future some time after they retired.

---

aspect of the medical benefits currently available, that assertion is irrelevant to the appropriateness for class certification of Petitioners' claims of individualized reliance. Likewise unsupported by any facts is Petitioners' allegation that "such an avalanche" of employees retired in the fall of 1992 "that the company had severe difficulty processing all of the applications." (Petition, p. 5). Furthermore, as noted below, Petitioners erroneously describe a number of terms of Delta's benefits programs. Similarly, in purporting to identify "factual" support for their assertions, Petitioners repeatedly cite not to evidence, but their own briefs that themselves mischaracterize the factual record. (*E.g.*, Petition, pp. 4, 6, which cite to "R2-20," Petitioners' reply brief in support of their class certification motion). Indeed, Petitioners' factual statement, even taken as a whole, "fail[s] . . . to present with accuracy, brevity, and clarity wha[t] is essential to ready and adequate understanding" of the case, and thus "is sufficient reason for the Court to deny [the] petition." Sup. Ct. R. 14.4.

Respondents provide the following summary to place Petitioners' contentions in the proper context:

1. The Clear Terms Of Delta's Medical Benefits Plan and Handbook

Delta Air Lines, Inc., ("Delta") sponsors the Delta Family-Care Medical Plan (the "Plan"), which provides medical benefits to active and retired Delta employees and is administered by the Delta Air Lines Administrative Committee.[3] In accordance with the requirements of ERISA, the terms of the Plan are set forth in a formal written document and are communicated to each participant by means of a summary plan description ("SPD"), which is contained in Delta's Benefits Handbook. *See* 29 U.S.C. §§ 1022, 1102(a)(1). Both the Plan and the Benefits Handbook explicitly reserve Delta's right to change, modify, amend or discontinue the benefits offered under the Plan. For example, the 1992 Benefits Handbook Supplement stated as follows:

> The following are the changes that were made to the Family-Care Benefit Program for 1992. As always, Delta reserves the right to change, modify, amend or discontinue the benefits described in this supplement or the Benefits Handbook at

---

[3] The Plan is a welfare benefit plan as defined in the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(1). As such, the Plan is not subject to ERISA's vesting, participation, and minimum funding requirements. *See* 29 U.S.C. §§ 1051(1), 1081(a)(1). "Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S. Ct. 1223, 1228 (1995).

> any time. These changes may be applied to you and your eligible family members even if you are no longer an active employee at the time the change is made.

(Hudson Dep., Ex. 2)[4] This reservation of r ghts was repeated in other communications to participants, such as the "Benefit Participation Information" (received by every participant who indicated an intent to retire) which in 1992 stated that "[t]he following benefits include all benefits changes that went into effect through July 1, 1992. As always, Delta reserves the right to change, modify, amend or discontinue the benefits described in this handout at any time." (*E.g.*, Cassell Dep., Exh. 77).[5] Neither the Plan, the Benefits Handbook, nor any other document indicates in any way that benefits are promised for any period or duration of time or that they are not subject to change after retirement commences.

Petitioners here seek to create exceptions to the clear Plan and Benefits Handbook language by taking a number of non-Plan communications, both oral and written, out of context as the purported basis for their asserted individualized understandings in contradiction

---

[4] Excerpts from the depositions to date as well as certain documents produced in the case were included in the "Appendix Of Appellees," which was filed in the Court of Appeals.

[5] Contrary to Petitioners' assertion, this was not "the first time in the Company's history" that Delta reserved the right to modify medical benefits (Petition, p. 6); Benefits Handbooks produced in discovery show that at least as far back as 1977, Delta expressly reserved the right to change or terminate the plan.

to the Plan. Petitioners assert claims of purported breach of an alleged "bilateral" contract, breach of fiduciary duty, and fraud based on relatively modest changes made in their post-retirement medical benefits after they retired. While Petitioners have adopted various legal theories, each of their claims depends on each individual's ability to establish some right to ignore the clear language of the Plan and Benefits Handbook that they have no vested rights in post-retirement medical benefits and that those benefits can be changed. Similarly, Petitioners also assert that each was "fraudulently induced" to retire when they did because Respondents did not tell them about an enhanced retirement program that did not then exist and was not offered until months after they retired. This claim, too, is based on allegations unique to each individual, each of whom purports to rely on a variety of alleged oral sources.

2. Prospective Changes To The Plan Announced By The Company

a. The Service-Related Premium

In August 1991, Delta introduced a Service-Related Premium for retiree medical benefits.[6] Previously, Delta had provided post-retirement medical coverage without

---

[6] The Service-Related Premium applied *prospectively* to those individuals who retired on or after January 1, 1992 who: (1) had not attained normal retirement age (65) and had less than 30 years' service; or (2) had attained normal retirement age but had less than ten years of service. (Hudson Dep., Exhs. 2 & 10).

requiring any premium contribution from the retiree, regardless of the retiree's years of service with Delta or whether he or she retired before normal retirement age. As a result, Delta paid more in monthly post-retirement medical coverage to some retirees with limited Delta service than their monthly pension benefits. (Hudson Dep., Ex. 2, 10). Retirees subject to the service-related premium were required to pay a premium for their post-retirement medical coverage, *i.e.*, a pro-rata contribution for coverage based on the retiree's years of service with Delta. (Hudson Dep., Exhs. 2 & 10). A very narrow exception to the service-related premium was specifically made for "[c]urrent Delta personnel who have attained age 52 or older as of January 1, 1992" and who retired after that date. (Hudson Dep., Exhs. 2 & 10). Those individuals were said to be "grandfathered" in the sense that they were specifically exempted at that time from the effects of the Service-Related premium announced in 1991. (*Id.*).[7]

---

[7] As explained in the 1992 Benefits Handbook Supplement:

> 1. *Postretirement Medical and Dental Benefits*
>
> Due to new Financial Accounting Standards (FASB) rules, Delta implemented several new policies regarding postretirement medical and dental benefits. Effective January 1, 1992, for personnel who had not reached age 52 by that date, the Company amended the Family-Care Medical Plan *to add a service related contribution* in order to continue medical/dental benefits after retirement. If you were at least age 52 by January 1, 1992, *this amendment* does not *currently* affect you. (Former Pan American personnel are not included in this *grandfather* provision).

(Hudson Dep., Exh. 2) (emphasis supplied). Thus, Petitioners' attempt to recast this as an "implied" guarantee that medical

b. Prospective Changes Announced In 1992

As a result of accounting standard changes adopted by the Financial Accounting Standards Board ("FASB"), Delta was faced with an estimated unfunded liability for future retiree medical benefits of over $1 billion,[8] which would lower Delta's investment rating and make it more difficult for Delta to obtain the financing necessary to the Company's continued well-being. (Worth Dep., pp.

---

benefits would "never" be changed is indefensible. Each document in the record clearly shows that this limited exception from the Service-Related Premium was *never* represented to be an "assurance" that any employee "would be 'grandfathered' into their existing, generally cost-free medical benefits," as the Petition (*e.g.*, pp. 4-5) asserts. "Grandfathering" clearly applied only to those employees who had turned age 52 before January 1, 1992, who would not be subject to the Service-Related Premium when they retired ***"regardless of [their] length of service."***

[8] Major corporations throughout the country were grappling with a new standard for reporting liabilities associated with employee benefits plans. FASB had announced Financial Account Standard ("FAS") 106, which would require a corporation; for fiscal years beginning after December 15, 1992, to treat its *future* retiree medical benefits obligation as a present liability on its financial statements. (Hudson Dep., Exhs. 2 & 10). FAS 106 requires an employer to project the cost of providing post-retirement medical benefits for all retirees and current employees, assume future cost increases at medical inflation rates, and assume that coverage continues for the expected lifetime of all personnel. (*Id.*, Exh. 10). Pursuant to FAS 106, this total future cost, not merely the present cost, of medical benefits must be recognized an expense on a company's financial statement in current accounting periods. (*Id.*)

59-60). To curb such liabilities, some companies discontinued post-retirement medical benefits, while other companies shifted the full cost of such coverage to retirees. (*Id.*, Exh. 10). Delta, however, adopted a moderate approach so that post-retirement medical benefits could be continued but FAS 106 liability reduced. Accordingly, Delta implemented a number of initiatives to lower costs, increase competitiveness, and reduce its FAS 106 liability.

In mid-1992, Delta announced additional prospective changes in its medical benefits for active employees and retirees. Under the revised Plan, employees who retired *after* January 1, 1993, and before reaching age 62, were required to pay the full cost of their medical benefits during the time period between their retirement and their attainment of age 62 (later changed to 65) with Delta paying the costs thereafter (except for the Service-Related Premium). Thus, early retirees under the revised Plan who retired after January 1, 1993, before reaching age 62, would be required to pay an "early retirement premium," essentially equal to Delta's full cost for medical coverage, to continue that coverage until reaching age 62. In addition, Delta announced other changes to become effective in January 1993, such as changing the way in which Medicare benefits were coordinated. Some of the announced changes were prospective only (*e.g.*, the early retirement premium) in the sense that they took effect with employees retiring after January 1, 1993. However, other changes affected *all* retirees, including Petitioners, effective January 1, 1993.[9]

---

[9] These changes include the way in which Medicare is coordinated with the Medical Plan for retirees who attain age

At the time these changes were announced, Delta explicitly stated that further changes or reductions in benefits could be made in the future. (*E.g.*, Hudson Dep., Exhs. 2, 10, 12; Cassell Dep., Exh. 77). In addition to the explicit reservation language in the Plan document and the summary plan description contained in the Benefits Handbook, the memorandum by which Delta announced the changes effective January 1, 1993 also explicitly stated that additional changes might be necessary in the future and that such changes could be applied to those individuals who had already retired. (Hudson Dep., Exh. 12, ¶ 12, p. 2).[10] In June 1993, Delta announced such further

---

65, increases in certain deductibles, annual limitations on certain dental care, and implementation of a new prescription drug program.

[10] For example, the July 23, 1992 memorandum to all employees from the Senior Vice President – Personnel, misdescribed in the Petition (p. 6), made this clear. Moreover, not only did that memorandum describe the benefits changes that were to take effect January 1, 1993, it also explicitly stated: *"It should be recognized that changes in addition to those explained in this memo could be necessary in the future and could be applied to retirees, as well as to active personnel."* (Hudson Dep., Ex. 12, p. 4) (emphasis supplied). Although Petitioners allege that the October 5, 1992 memorandum from the Assistant Vice President – Personnel Benefits did not include a reference to a "reservation of rights" clause, (1) the memo was addressed to management, not to employees, and (2) the then-current Benefits Handbook already contained a clear reservation of rights, as discussed above, and the memorandum contains nothing to the contrary. (Hudson Dep., Exs. 2, 16). Moreover, while Petitioners make reference to "well-scripted pre-retirement seminars" and a "Benefit Hotline" (Petition, p. 8), Petitioners cite no evidence, because there is absolutely no evidence, that any assurances of the kind Petitioners assert were made.

changes, including the requirement that all retirees would be charged a premium equal to ten percent of Delta's cost of providing medical and dental benefits.[11]

3. The August 1993 Enhanced Retirement Program

Delta did not implement special retirement inducements or enhancements to any benefit plan at the time the prospective benefits changes were announced in 1992.[12] The benefits available to retirees were those benefits described in the Plan and Benefits Handbook. No special "package" or "program" of benefits was available to retirees. However, Delta did announce an enhanced retirement program in August 1993. At the time of plaintiff's retirements on or prior to January 1, 1993, Delta had no plans for such an incentive program. The enhanced retirement program was available only from August 24, 1993, through October 15, 1993 (with retirement to commence on November 1, 1993). It also was offered only to

---

[11] Contrary to the unsupported assertion in the Petition (p. 5), Petitioners were never told that they "were no longer grandfathered"; those employees who retired before January 1, 1993 and who were (1) employed by Delta on August 16, 1991 and (2) had attained age 52 by January 1, 1992, still did not have to pay the Service-Related Premium, which is all that the term "grandfathered" ever referred to. *See* note 7, *supra*.

[12] The memoranda described in note 11, *supra*, like all the other documents in this case, demonstrate that there was no "window" or retirement "incentive" program in connection with these announced prospective benefits changes. Likewise, there is no support (and thus none cited by Petitioners) for the assertion (Petition, p. 7) that Delta "was seeking to . . . reduce the ranks of its older employees."

employees in specifically targeted areas of the Company that needed to be downsized. Eligible participants retired with additional retirement benefits and were exempted from the full-cost early retirement premium (although the Service-Related Premium, described above, continued to apply, as would future Plan changes).

REASONS FOR DENYING THE WRIT

I.

The Routine Exercise Of Discretion In Applying Class Certification Standards To The Individualized Reliance Claims Of Petitioners In This Case Does Not Present An Issue For Review By This Court

The factors to be considered under Fed. R. Civ. P. 23(a) are well established (*i.e.*, numerosity, typicality, commonality, and appropriate class representatives) as is the standard for reviewing the District Court's application of those factors to facts in particular cases, *i.e.*, whether the District Court abused its broad discretion in applying the factors. *E.g., General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982); *Van Poyck v. Singletary*, 11 F.3d 146 (11th Cir. 1994). The District Court's exercise of discretion in this regard is to be respected unless "infected by an error of law" in the *standards* employed by the court. *E.g. Abrams v. Interco, Inc.*, 719 F.2d 23, 28 (2d Cir. 1983) There was no error in the *standards* applied by the District Court here to the facts of this case (*i.e.*, the Rule 23 factors of commonality and typicality). The Court of Appeals correctly concluded that, based on the *facts* presented, the District Court had not abused its discretion in denying

Petitioners' class certification motion. *Hudson*, 90 F.3d at 456-57.

As the Court of Appeals found, Petitioners' claims are based on each plaintiff's alleged personal understanding of, and purported reliance on, a highly individualized assortment of oral and written communications in an attempt to circumvent the right expressly reserved by Delta in the Plan and the Benefits Handbook "to change, modify, amend, or discontinue" benefits. Petitioners attempt to avoid that clear provision of the Benefits Handbook and the Plan by taking the term "grandfather" out of the narrow context in which it was used. Petitioners seek to apply that term in a completely separate situation – *i.e.*, to changes in the Plan announced in 1992 – rather than the way it was in fact used – *i.e.*, to describe a specific group of persons who were not currently affected by one specific change to the Plan announced in 1991.

Indeed, the only "unity" identified by Petitioners is the desire of each of them to use their individual reasons and considerations for retiring to overcome the consistent, unified message communicated to all employees in the Benefits Handbook – that changes could be made in medical benefits, even after they retired. Accordingly, the District Court found that Petitioners failed to show that "the questions of *fact* in each affected retiree's case are common to any other retiree's case." (R1-24-8) (emphasis supplied). To the contrary, the Court found, the "factual issues" as to which representations "each retiree was aware of" and "the extent to which each retiree relied on the alleged representations in making his or her retirement decision. . . . must be resolved independently for

each retiree." The District Court was well within its discretion and applicable law not to grant class certification to Petitioners' ERISA claims, especially when those claims are based on individual, subjective perceptions of a mixture of oral and written communications. *E.g., Alday v. Container Corp. of Am.*, No. 87-488-CIV-J-16, 1988 U.S. Dist. LEXIS 18421, *4-*6 (M.D. Fla. Sept. 2, 1988); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993), *cert. denied*, 117 S. Ct. 305 (1996); *Polich v. Burlington Northern, Inc.*, 116 F.R.D. 258, 261-62 (D. Mont. 1987); *Spencer v. Central States, Southeast & Southwest Areas Pension Fund*, 778 F. Supp. 985, 990-91 (N.D. Ill. 1991); *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 56, 58 (S.D. Fla. 1990).[13] Indeed, Petitioners still have not and cannot

---

[13] Petitioners rely on a number of inapposite cases (Petition, p. 24 & n.5), such as *Johnston v. Midland Career Inst.*, No. 93 C 1363, 1993 WESTLAW 420954 (N.D. Ill. Oct. 18, 1993), and *Smith v. MCI Telecommunications Corp.*, No. Civ. A. 87-2110-0, 1990 WESTLAW 58708 (D. Kan. Apr. 9, 1990), neither of which involves employee benefits but rather claims of a scheme or pattern of racketeering under RICO. The only feature of the *Johnston* and *Smith* cases comparable to this case is an *allegation* of a "scheme." However, even if Petitioners established some plan or scheme to get them to retire as previously alleged in their briefs, they would not prevail on their ERISA claims. To prevail on their ERISA claims, Petitioners would have to establish, among other things, that Delta's intention was to interfere with Petitioners' right under a plan in violation of ERISA or that Delta breached some obligation under ERISA. *See* 29 U.S.C. §§ 1104, 1140. However, an employer's desire to provide economic encouragement to promote early retirement from its workforce neither interferes with ERISA plan rights nor breaches any obligation of the employer. *See, e.g., Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1543-44 (3d Cir. 1996); *Clark v. Coates & Clark, Inc.*, 990 F.2d 1217,

identify any evidence of a "standardized offer" to "grandfather" them into existing medical benefits or point to a single document that makes such a purported offer, let alone one received by the entire putative class. Petitioners' claims depend entirely on their claimed reliance on what has proved to be a unique pastiche of oral and written communications (that purport to contradict the controlling provisions of the Plan and the Benefits Handbook).[14]

1224 (11th Cir. 1993); *Adams v. LTV Steel Mining Corp.*, 936 F.2d 368 (8th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992). Furthermore, *Johnston* centered around the plaintiffs' common reliance on a radio advertisement, and *Smith* hinged on a "smoking-gun" document that established the employer's intent not to pay promised commissions to its salespersons. As discussed above, there is no such "unifying" communication here. The only "unifying" communication to Petitioners was the reservation of the right to amend at any time in the Plan and the Benefits Handbook, which Petitioners seek to undermine through an array of informal, *ad hoc* communications.

[14] The depositions of the representative Petitioners taken to date powerfully reaffirm that conclusion. Excerpts from those depositions were provided to the Court of Appeals in the "Appendix of Appellees." Petitioners' own testimony demonstrates that each Petitioner here purports to have relied on numerous, different sources that include the rumor mill; conversations with co-workers, individual benefits instructors, or supervisors; and their subjective and out-of-context interpretations of a variety of documents that vary from Petitioner to Petitioner. Petitioners' claims could thus only be established by proof that each individual Petitioner reasonably relied on such an eclectic and unique collection of oral and written parol communications outside of the ERISA plan documents. Regardless of whether the putative class purports to rely on the same legal theory, the claim of each putative class member would have to be established with factual precision.

Likewise, Petitioners' claim that each of them was fraudulently induced to retire because they were not told of alleged future plans to offer an early retirement incentive program is not appropriate for class treatment. Petitioners cannot identify any written communication that stated that no enhanced retirement program would be offered after they retired. Instead, Petitioners premise their "concealment" claims entirely on one-on-one conversations allegedly had with a variety of different individuals – again, presenting unique claims that would have to be established separately for each individual member of the putative class.

On the facts presented to the District Court, there was no abuse of discretion in denying class certification, and the Court of Appeals properly affirmed that ruling. Accordingly, Petitioners have presented no basis for reviewing the Eleventh Circuit's affirmance, and the writ should therefore be denied.

II

The Court Of Appeals' Decision Here Does Not Conflict With Decisions Of Any Other Circuit

Without ever mentioning that the ruling at issue is reviewed under an abuse of discretion standard, Petitioners attempt to create the appearance of a reviewable issue by asserting that the Eleventh Circuit applied class

---

This would inevitably require case-by-case consideration of individual, subjective perceptions of a mixture of oral and written communications – that precludes a finding of the commonality and typicality needed for class certification under Rule 23(a).

certification standards that are "sharply different and impossibly high" and "in conflict . . . with other Circuits." (Petition, pp. 23, 25). However, there is no "conflict" with any other Circuit, and no standards applied other than the commonality and typicality requirements provided for by Rule 23. The Eleventh Circuit simply found no abuse of discretion in the District Court's application of the commonality and typicality requirements to the facts of Petitioners' individualized reliance claims, a result confirmed by the record before it. Nevertheless, Petitioners attempt to force the facts of their case into the very different fact patterns of a number of other cases in a disingenuous effort to create the illusion of a conflict.

For example, Petitioners argue that this case "is at odds with" *Sprague v. General Motors Corp.*, 92 F.3d 1425 (6th Cir. 1996) – a case that Petitioners fail to make clear was vacated for rehearing *en banc*. *Sprague v. General Motors Corp.*, ___ F.3d ___, 1996 U.S. App. LEXIS 29367 (6th Cir. Nov. 7, 1996). *Sprague* is the case Petitioners have primarily – indeed, exclusively – relied on, desperately trying to draw analogies from it to their own case that simply do not exist. Indeed, not only has *Sprague* been vacated – a fact which Petitioners fail to mention although *Sprague* was vacated six weeks before the Petition was filed – Petitioners have no facts that fit the legal theory in *Sprague* regardless of whether that theory is correct law. The plaintiffs in *Sprague* whose claims were tried by the district court retired under a special window incentive retirement program announced by the company to induce retirements. That program included the promise that if they accepted retirement under the special window, the terms of the window, including the medical

benefits, would remain fixed for "life." *Sprague v. General Motors Corp.*, 768 F. Supp. 605, 612 (E.D. Mich. 1991); *Sprague v. General Motors Corp.*, 843 F. Supp. 266, 301 (E.D. Mich. 1994); *accord Sprague v. General Motors Corp.*, 857 F. Supp. 1182, 1191 (E.D. Mich. 1994).[15]

Here, by contrast, there was no window program and no offer of enhanced retirement benefits to its participants. Delta simply announced impending changes in post-retirement medical benefits. Petitioners decided that before those changes became effective on January 1, 1993, they would retire in the normal course under the already-existing terms of the Plan, which reserves Respondents' right to make changes in medical benefits after Petitioners retired and which provides no guarantee of "fixed" or "lifetime" benefits. In fact, petitioners' failure to adduce any facts to support a *Sprague*-like theory caused the Eleventh Circuit to conclude – regardless of the legal theories into which Petitioners purport to try to force their claims – that the facts *here* amply support the District Court's exercise of discretion in denying class certification. *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996).[16] Instead, Petitioners' reliance on "a

---

[15] Each of these decisions was reviewed by Sixth Circuit panel, 92 F.3d 1425 (6th Cir. 1996), whose opinion has been vacated, as noted previously, ___ F.3d ___, 1996 U.S. App. LEXIS 29367 (6th Cir. Nov. 7, 1996).

[16] Recently, the Third Circuit rejected a similar attempt to misuse the district court decisions in *Sprague* by a group of retirees who claimed that they retired with the understanding that they would "receive vested lifetime medical benefits." *In re Unisys Corp. Retiree Med. Ben. "ERISA" Litig.*, No. 94-1801, 1995 U.S. App. LEXIS 15020, *2, *8-*13 & n. 3 (3d Cir. June 28, 1995).

vast array of oral and written statements" in an attempt *to avoid* the consistent message of Delta's Benefits Handbook demonstrates that the Eleventh Circuit correctly affirmed the District Court's denial of class certification. *Hudson*, 90 F.3d at 457.[17]

Similarly, neither *In re Unisys Corp. Retiree Medical Benefits "ERISA" Litigation*, 57 F.3d 1255 (3d Cir. 1995), *cert. denied*, 116 U.S. 1316 (1996); *Varity Corp. v. Howe*, ___ U.S. ___, 116 S. Ct. 1065 (1996); nor any of the other cases cited by Petitioner conflict with the Court of Appeals' decision here. *Unisys* turned on an ambiguity in summary plan descriptions created by the explicit provision that *"[W]hen you retire, your medical benefit will be continued for the rest of your life." Id.* at 1259 (emphasis supplied). Again, this may be an example of the kind of uniform communication through "written plan documents" that, as the Eleventh Circuit observed, is entirely missing in this case. *Hudson*, 90 F.3d at 457.[18]

The *Unisys* court concluded that "*Sprague* is factually inapposite" and "decline[d] . . . to follow its reasoning" because *Sprague* involved "overwhelming evidence" that General Motors had stated that "health care [benefits] would be provided for" each retiree's " 'lifetime' " as part of the separate consideration for a window retirement program – the crucial fact the court found "conspicuously absent in" *Unisys*. *Id.* at *8-*9, *10-*12. That crucial fact is also wholly absent in this case.

[17] Furthermore, because the claims in *Sprague* involved only changes in retiree medical benefits, not allegations concerning non-disclosure of future retirement programs, *Sprague* also does not support class-certification for Petitioners' claims in Counts II-IV of their Amended Complaint concerning the enhanced retirement program implemented in August 1993.

[18] The lengths to which Petitioners have gone to mischaracterize the issues are epitomized by their assertion that

Nor is there any conflict with *Varity*. Again, unlike Petitioners' claims here, the *Varity* claims were based on a uniform, express misrepresentation by plan fiduciaries to employees that " '[t]here w[ould] be no change in pension benefits as a result of [their] transfer' " to a new retirement benefit plan, created by the employer's "transfer of money-losing divisions, along with various other debts, to a newly created, separately incorporated subsidiary" that the employer "foresaw the possibility . . . would fail" and that "was insolvent from the day of its creation" and "hid a $46 million negative net worth by overvaluing its assets and underestimating its liabilities." 116 S. Ct. at 1069, 1071-72.[19]

"the Eleventh Circuit has endorsed a substantive view of ERISA which stands in absolute opposition to the [T]hird [C]ircuit's analysis in *Unisys*" (Petition, p.23), when the Eleventh Circuit in fact stated:

> *We voice no opinion as to whether the plaintiffs could state a claim under such circumstances.* Even if they could, none of the evidence of record to date, which consists solely of informal company communications, supports the plaintiffs' allegations that they were assured that the terms of their medical coverage would never change.

Hudson, 90 F.3d at 458 (emphasis supplied).

[19] Petitioners misstate the law when they contend that "large groups of retirees with ERISA claims against a common *employer* have routinely been allowed to press those claims in a class action." (Petition, pp. 23-24) (emphasis supplied). The commonality requirement clearly requires more than that, as the cases cited by Petitioners demonstrate. For example, the appellate court in *In re American Med. Sys. Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996), cited by Petitioners, granted a writ of mandamus against a district judge who had certified a class against a "common" defendant where the claims required

Although Petitioners have attempted to force the facts of their claims into the *Sprague, Unisys,* and *Varity* molds, Petitioners' facts simply do not fit the legal theories they would like to use. Having no "*written* plan documents which notified the putative class that the terms of their medical benefits plan would remain constant throughout their retirement if they retired on or before January 1, 1993," *Hudson,* 90 F.3d at 457 (original emphasis), Petitioners make a weak attempt to "conform" their case to those cases they seek to emulate by latching onto one isolated phrase – "grandfather" – which applies to a different change made well before they retired. The Eleventh Circuit properly rejected this effort to rely on that inapplicable term, specifically ruling with respect to Petitioners' "grandfather" assertion that "nothing in the record supports the plaintiffs' claims that they were also told that the particular type of medical benefits included in the ERISA plan would be provided in perpetuity." *Hudson,* 90 F.3d at 458 n.13. Accordingly, regardless of whether class actions might be based on *Sprague, Unysis, or Varity,* the Eleventh Circuit correctly observed *in this case* that

> [e]ven if [Petitioners' theory] could [state a claim under ERISA], none of the evidence of record to date, which consists solely of informal

---

individualized proof. Similarly, *Forbush v. J.C. Penney Co.,* 994 F.2d 1101 (5th Cir. 1993), turned not on the identity of the employer, but rather on the undisputed existence of the practice of the employer under all of its benefits plans of overestimating Social Security benefits to offset against participants' plan benefits.

> company communications, supports the [Petitioners'] allegations that they were assured that the terms of their medical coverage would never change. *With this record as our only source of information, we can find no abuse of discretion by the [D]istrict [C]ourt in denying class certification. . . .*

Id. at 458 (emphasis supplied).

Accordingly, based on the highly individualized nature of each putative class member's claim, there is ample evidence in the record to support the Court of Appeal's conclusion that the District Court's denial of class certification was well within the realm of discretion accorded to the District Court in making such determinations. Thus, Petitioners' indiscriminate efforts to latch on to any case as a bootstrap to get before this Court are meritless and should be rejected.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the petition forthwith.

Respectfully submitted,

WILLIAM H. BOICE*
JEFFREY A. VAN DETTA

KILPATRICK & CODY
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
(404) 815-6500

D. MICHAEL KEEN
DEBORAH D. BROWN
MONROE T. HILL, JR.

Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta
International Airport
Atlanta, Georgia 30320
(404) 715-2386

Attorneys for Respondents
**Counsel of Record*